TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT.

Oct. Term, 1891

No. 114

MAURICE WISE *et al.*,
Plaintiffs and Defendants in Error,
vs.
CHARLES M. JEFFERIS,
Defendant and Plaintiff in Error.

In Error to the Circuit Court of the United States for the District of Montana.

Filed January 11 1892.

United States of America, ss.

To Maurice Wise and Jacob Bauland, surviving partners of the firm of Austrian, Wise & Co., Henry G. Foreman, trustee for Meyer E. Lindauer, Benjamin Lindauer, Seligman Lindauer, and Aaron Rosenblatt, co-partners under the firm name of Lindauer Bros. & Co.; Bernard Cahn, Charles Cahn, Joseph Cahn, Louis Wampold and David Wallach, co-partners under the firm name and style of Cahn, Wampold & Co.; Charles W. Turner and Andrew F. Burleigh, co-partners under the firm name and style of Turner & Burleigh, and Messrs. Cullen, Sanders & Shelton, their attorneys, *Greeting:*

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 10th day of September, A. D. 1891, pursuant to a Writ of Error filed in the office of the Clerk of the Circuit Court of the United States, of the Ninth Circuit, for the District of Montana, wherein Charles M. Jefferis is plaintiff in error, and you, said Maurice Wise and Jacob Bauland, surviving partners of the firm of Austrian, Wise & Co.; Henry G. Foreman, trustee for Meyer E. Lindauer, Benjamin Lindauer, Seligman Lindauer and Aaron Rosenblatt, co-partners under the firm name and style of Lindauer Bros. & Co., Bernard Cahn, Charles Cahn, Joseph Cahn, Louis Wampold and David Wallach, co-partners under the firm name and style of Cahn, Wampold & Co.; Charles W. Turner and Andrew F. Burleigh, co-partners under the firm name and style of Turner & Burleigh,

are defendants in error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of [SEAL] America, this 11th day of August, A. D. 1891, and of the Independence of the United States, the one hundred and fifteenth.

HIRAM KNOWLES,
U. S. District Judge.

Attest, etc.:
GEO. W. SPROULE,
Clerk.

Copy of within citation received this 11th day of August, A. D. 1891.

CULLEN, SANDERS & SHELTON,
Attorneys for Plaintiffs.

United States of America, ss.

The President of the United States of America,

To the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the District of Montana, *Greeting:*

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Circuit Court, before you between Charles M. Jefferis, plaintiff in error, and Maurice Wise and Jacob Bauland, surviving partners of the firm of Austrian, Wise & Co.; Henry G. Foreman, trustee for Meyer E. Lindauer, Benjamin Lindauer, Seligman Lindauer, and Aaron Rosenblatt, co-partners under the firm name of Lindauer Bros. & Co.; Bernard Cahn, Charles Cahn, Joseph Cahn, Louis Wampold and David Wallach, co-partners under the firm name and style of Cahn, Wampold & Co.; Charles W. Turner and Andrew F. Burleigh, co-partners under the firm name and style of Turner & Burleigh, are defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of

San Francisco, State of California, on Thursday, the 10th day of September next, in the said United States Circuit Court of Appeals, to be there and then held, that the record and proceedings aforesaid be inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

WITNESS, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 11th day of August, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

[SEAL]

GEO. W. SPROULE,
Clerk.

The above writ of error is hereby allowed.

(Signed) HIRAM KNOWLES,
U. S. District Judge.

The Answer of the Judges of the Circuit Court of the United States, for the District of Montana.

The record and all proceedings of the plaintiff, whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the Court.

GEORGE W. SPROULE,
Clerk.

[SEAL]

PLEAS in the Circuit Court of the United States, for the Ninth Circuit, District of Montana, held at the United States Court room, in the City of Helena, in the District aforesaid, before the Honorable Hiram Knowles, United States District Judge, for the District of Montana, on the 6th day of October, in the April term of said court, in the year of our Lord one thousand eight hundred and ninety-one, and of our Independence the one hundred and fifteenth.

GEO. W. SPROULE,
Clerk U. S. Circuit Court, Ninth Circuit, District of Montana.

MAURICE WISE *et al.*,
Plaintiffs,
vs.
CHARLES M. JEFFERIS,
Defendant.

BE IT REMEMBERED, That on the 22d day of October, A. D. 1890, came the plaintiffs, by their attorneys, and filed in the office of the Clerk of the Circuit Court of the United States, for the Ninth Circuit, District of Montana, their complaint, which said complaint is in the words and figures following, to-wit:

COMPLAINT

IN THE

United States Circuit Court, Ninth Circuit, District of Montana.

Maurice Wise and Jacob Bauland, surviving partners of the firm of Austrian, Wise & Co.; Henry G. Foreman, trustee for Meyer E. Lindauer, Benjamin Lindauer, Seligman Lindauer and Aaron Rosenblatt, co-partners under the firm name and style of Lindauer Bros. & Co.; Bernard Cahn, Charles Cahn, Joseph Cahn, Louis Wampold and David Wallach, co-partners under the firm name and style of Cahn, Wampold & Co.; Charles W. Turner and Andrew F. Burleigh, co-partners under the firm name and style of Turner & Burleigh, Plaintiffs, vs. Charles M. Jefferis, Defendant.

THE PLANTIFFS COMPLAIN AND ALLEGE:

That on or about the 18th day of March, 1889, and at the date of the transactions hereinafter set forth, Solomon Austrian, Maurice Wise, Jacob H. Bauland were co-partners in business under the firm name and style of Austrian, Wise & Co.

That afterwards and prior to the commencement of this suit, said Solomon Austrian died, and said Maurice Wise and Jacob H. Bauland, as surviving partners of

said firm of Austrian, Wise & Co., have been, and now are, engaged in winding up the business of said firm, which is now in process of liquidation.

That at all the times hereinafter mentioned, said Henry G. Foreman was, and still is, trustee for the benefit of the creditors of the firm of Lindauer Bros. & Co., a co-partnership composed of Meyer E. Lindauer, Benjamin Lindauer, Seligman Lindauer, and Aaron Rosenblatt, which said firm heretofore, and prior to the dates hereinafter named, had become financially involved and had transferred all its property to said Henry G. Foreman, as trustee for the benefit of their creditors, and said Henry G. Foreman is now, and at all times hereinafter mentioned, has been the successor in interest of said Lindauer Bros. & Co., in the property hereinafter mentioned and set forth and in the rights claimed in this action.

That at all the times hereinafter mentioned, Bernard Cahn, Charles Cahn, Joseph Cahn, Louis Wampold, and David Wallach, were, and still are co-partners in business under the firm name and style of Cahn, Wampold & Co.

That at all times hereinafter mentioned, Charles W. Turner and Andrew F. Burleigh were co-partners in business under the firm name and style of Turner & Burleigh.

That at the date of the commencement of this suit, Maurice Wise, Jacob H. Bauland, Henry G. Foreman, Meyer E. Lindauer, Benjamin Lindauer, Seligman Lindauer, and Aaron Rosenblatt, Bernard Cahn, Charles Cahn, Joseph Cahn, Louis Wampold and David Wallach were, and are, citizens of the State of Illinois, and residents thereof.

That at the time of the commencement of this action said C. W. Turner and Andrew F. Burleigh were, and still, are citizens of the State of Washington.

That at the date of the commencement of this action, Charles M. Jefferis, the defendant, was, and still is, a citizen of the State of Montana.

That all of the plaintiffs are citizens of other States than the State of Montana, and residents without the State of Montana.

That said Charles M. Jefferis is a citizen of a different State, to-wit, the State of Montana, from that of any and all of the said plaintiffs.

That prior to the 18th day of March, 1889, J. E. Landsman and Julius Cohen, had been co-partners in business under the firm name and style of J. E. Landsman & Co.

That as plaintiffs are informed and believe, prior to said 18th day of March, 1889, said firm of J. E. Landsman & Co. had dissolved, and said Julius Cohen had withdrawn from said firm and transferred to said J. E. Landsman, all his interest in the property and effects of said firm of said J. E. Landsman & Co., to said J. E. Landsman, and said J. E. Landsman had assumed all the indebtednes of said firm.

That on said 18th day of March, 1889, said J. E. Landsman, as the successor of said firm of J. E. Landsman & Co., as well as in his individual capacity, was indebted to said firm of Austrian, Wise & Co., Cahn, Wampold & Co., Henry G. Foreman, trustee of Lindauer Bros. & Co., and to Turner & Burleigh, in the sum of twelve thousand five hundred dollars; which said indebtedness is wholly unpaid.

That to secure said indebtedness to said parties above named, to-wit: Said Austrian, Wise & Co., Cahn, Wampold & Co., Henry G. Foreman, trustee, and Turner & Burleigh, said J. E. Landsman transferred to said parties above named, the goods and chattels hereinafter mentioned and set forth.

That while said goods and chattels, and all of them were in possession of said J. E. Landsman, in the

store of said J. E. Landsman, in the city of Helena, County of Lewis and Clarke, State of Montana, and he was the owner of all thereof, said Landsman, on the said 18th day of March, 1889, transferred and delivered to William Oliver, the authorized and accredited agent of the plaintiffs, all of the goods and chattels hereinafter mentioned, and delivered to said William Oliver the actual and exclusive poseession thereof, and of said store, for the purpose of securing said plaintiffs in their said indebtedness of twelve thousand five hundred dollars, as above set forth.

That said Oliver as the agent of plaintiffs, entered into possession of said store, and into possession of said goods and chattels, which had been delivered to him by said Landsman as aforesaid, and remained and continued in the open, exclusive and notorious possession of said goods and chattels, until the wrongful acts of the defendant as hereinafter set forth.

That on said 18th day of March, 1889, the plaintiffs were the owners as above set forth, and in the actual possession of the following goods and chattels of the value of fifteen thousand dollars, then being in the said City of Helena, County of Lewis and Clarke, State of Montana, as follows, to-wit:

That certain stock of goods, wares and merchandise, in the store known as the Northwestern Clothing House, in the Thompson block, on Main street, in the city of Helena, Lewis and Clarke County, Montana, consisting of shirts, underwear, gents' furnishing goods, boots and shoes, hats and caps, clothing, trunks and valises, umbrellas, stationery, cutlery, gloves, hosiery, rubber goods, counters, shelving, fixtures, etc.

That on said 18th day of March, 1889, at the city of Helena, County of Lewis and Clarke, State of Montana, and while said goods were in the actual possession of said

plaintiffs, the defendant, without plaintiffs' consent, wrongfully took said goods and chattels from the possession of said plaintiffs.

That before the commencement of this suit, to-wit: on said 18th day of March, 1889, the plaintiffs demanded of the defendant possession of said goods and chattels.

That said defendant still unlawfully withholds and detains said goods and chattels from the possession of the plaintiffs, to their damage in the sum of three thousand dollars.

Wherefore, plaintiffs pray judgment against the defendant for the recovery of the possession of said goods and chattels, or for the sum of fifteen thousand dollars, the value thereof, in case a delivery cannot be had, and for three thousand dollars damages as aforesaid, and for costs of suit.

CULLEN, SANDERS & SHELTON,
Attorneys for Plaintiffs.

[Verified.]

IN THE UNITED STATES CIRCUIT COURT,
Ninth Circuit, for the District of Montana.

Eighth day, November term, A. D. 1890; Friday, November 14, 1890, 10 a. m.

Court convened pursuant to adjournment.

Present—Honorable Hiram Knowles, United States District Judge for the District of Montana.

No. 89—Maurice Wise *et. al.* vs. C. M. Jefferis.

This cause heretofore argued and demurrer therein overruled. It is ordered that defandant have until November 23, 1890, to file an answer.

And afterwards, and on the 22d day of November, A. D. 1890, the following further proceedings were had and entered of record herein, which said proceedings are in the words and figures following:

In the United States Circuit Court,
Ninth Circuit, District of Montana.

Fifteenth day, November term, A. D. 1890; Saturday, November 22d, 10 a. m.

Court convened pursuant to adjournment.

Present—Honorable Hiram Knowles, United States District Judge for the District of Montana.

No. 89—M. Wise *et al.* vs. C. M. Jefferis.

By consent and agreement of counsel, time to answer extended until November 28th, 1890.

And thereafter, to-wit: on the 3d day of December, A. D. 1890, the defendant filed his answer herein, which said answer is in the words and figures following, to-wit:

In the United States Circuit Court,
Ninth Circuit, District of Montana.

Maurice Wise *et al.*, Plaintiffs,
vs.
Charles M. Jefferis, Defendant.

Now comes the defendant in the above entitled action and for answer to the plaintiffs' complaint therein:

I.

As to whether the individuals named, Solomon Austrian, Maurice Wise and Jacob H. Bauland, were ever co-partners under any firm name whatsoever, and as to whether said Solomon Austrian died prior to the commencement of this suit, or whether said Wise and Bauland were, or are, surviving partners of said alleged firm; or as to whether said firm is in process of liquidation, or as to whether said Foreman was, or is, trustee for creditors of the alleged firm of Lindauer Bros. & Co., or whether said Lindauer and Aaron Rosenblatt composed said alleged firm, or whether the same has become finan-

cially involved, or transferred its property for the benefit of creditors; or whether Foreman was its successor in any respect; or whether Cahn, Wampold & Co. were, or are, partners as Cahn, Wampold & Co.; or whether each and all of the parties last above named were, or are citizens of Illinois; or whether said firm of Lindauer Bros. & Co. had dissolved prior to March 18, 1889, or the said Cahn withdrawn from said firm, or transferred his interest to Lindauer therein.

This defendant has not sufficient information to affirm and believe therefor and denies the same.

II.

On information and belief denies that on March 18, 1889, said J. E. Landsman, as the successor of the said firm of J. E. Landsman & Co., or in his individual capacity was indebted to the firm of Austrian, Wise & Co., Cahn, Wampold & Co., Henry G. Foreman, trustee, Turner & Burleigh, or any thereof, in the sum of $12,500, or any other sum; and absolutely denies that to secure said alleged indebtedness, or for any other purpose, said Landsman transferred to said parties above named the goods and chattels mentioned or any part thereof: or that when said goods and chattels, or any of them were in the possession of said Landsman in any store of Landsman in Helena, Mont., or elsewhere, or otherwise, or while he was the owner thereof, or of any thereof, said Landsman on March 18, 1889, or at any other time, transferred or delivered to one Oliver as the authorized or credited agent of plaintiffs or any of them, all or any of the said goods and chattels, or that he ever delivered to said Oliver, the actual or exclusive possession thereof, or any thereof, or of said store, for any purpose whatsoever; or that said Oliver as plaintiffs' agent or otherwise, entered into possession of said store, or of said goods or chattels, or ever at any time remained, contained or was

in the open, exclusive or notorious, or in possession of said goods and chattels or any thereof: or that these plaintiffs were ever the owners, or in the possession of said goods and chattels, or any thereof; or that the same were of the value of $15,000, or of any greater value than.....thousand dollars. Admits the taking of the goods and chattels on the day named in the complaint, but denies that the defendant took the same from, or while they were in the actual possession of plaintiffs, or their agent, or that he took them from plaintiffs' possession at all, or in any manner; or that such taking was wrongful or unlawful, or that he took in any other manner than is hereinafter set forth, or that they have been damaged in any sum whatsoever by the withholding of the said goods or chattels: and for further answer this defendant alleges that under and by virtue of certain writs of attachment regularly issued out of the District Court of the then Territory of Montana, in and for Lewis and Clarke County, which said writs had been regularly issued in suits wherein the following named parties were respectively plaintiffs, and in each and all of said suits, the said firm of J. E. Landsman & Co. was defendant, the said plaintiffs being respectively as follows, and the dates of the issuance of said respective writs, and the amounts for which said writs severally issued being as follows:

First National Bank of Helena, March 18, 1889.	$6,838 23
William Steinhart, March 21, 1889	5,095 00
M. Lissner, March 26, 1889.....	1,000 00
M. Rockman, March 26, 1889	975 00
Max Sternberg, March 26, 1889	1,150 00
P. P. Argersinger *et al.*, March 27, 1889	465 00
Desert Woolen Mills, March 27, 1889.....	257 79
Schloss Bros. & Co., March 27, 1889	845 75
Charles Falkenberg *et al.*, March 27, 1889 ..	618 00
A. M. Herod & Co., March 28, 1889	196 80

Henry Jonas, March 28, 1889	$4,719 21
George H. Atwell, March 28, 1889	415 81
Philip Carpetus and J. S. Hartman & Co., March 28, 1889	192 92
L. Marks *et al.*, March 28, 1889	331 50
Portage Hosiery Co., April 1, 1889	321 00
J. H. Lee & Co., April 1, 1889	371 48

Against J. E. Landsman and Julius Cohn.

This defendant levied and seized upon, and took the said goods and chattels into his possession as the sheriff of the County of Lewis and Clarke, taking the same from the possession and custody of said J. E. Landsman & Co., and in their store building at Helena, Montana, and that he duly held and retained possession of the said goods under his said writ until the 20th day of April, 1889, when he was superseded in possession thereof by one Marcus Lissner, who was duly appointed a receiver, with full power and authority, to receive, take, hold and dispose of the said goods, in a certain suit and action, wherein Max Sternberg was plaintiff and J. E. Landsman were defendants, being cause No. 4,604 upon the calendar of the District Court of First Judicial District, Lewis and Clarke county, Montana, and by virtue of his said authority took the same from defendant.

That this defendant in all and every act concerning the premises, acted solely in his official capacity, and in the performance of the duties enjoined upon him by law, and has no interest of any kind or character in the outcome of this action of a personal nature; and that the real parties who are interested therein as parties defendant, are parties named respectively as plaintiffs in the foregoing attachment suits; and he therefore prays that the said parties last above named, may be each and all by order of this court, be brought into this action and made parties defendant therein, and be permitted and com-

pelled to plead and counter plead with these plaintiffs; and that this defendant have and recover his costs of suit herein expended.

TOOLE & WALLACE,
Attorneys for Defendant.

[Verified.]

And afterwards, to-wit: on said 16th day of April, A. D. 1891, the plaintiffs filed their replication herein, which said replication is in the words and figures following, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES,
For the Ninth Circuit, District of Montana.

Maurice Wise *et al.*, plaintiffs, *vs.* Charles M. Jefferis, sheriff, defendant.

Now come the above named plaintiffs, and for reply to the answer of the defendant on file herein:

1. Deny on information and belief that the defendant, under and by virtue of certain writs of attachment regularly issued out of the District Court of the then Territory of Montana, in and for the County of Lewis and Clarke, which said writs had been regularly issued in suits wherein the parties named in said answer of defendants were respectively plaintiffs, or the said firm of J. E. Landsman & Co. were defendants, or that the dates of the issuance of said writs, or the amounts for which said writs were severally issued were as set forth in said defendant's answer, levied or seized upon or took said goods or chattels into his possession as the sheriff of the County of Lewis and Clarke.

2. Deny that said defendant took said goods, or any of them, from the possession or custody of said J. E. Landsman & Co., or that he took the same in the store building of said J. E. Landsman & Co., at Helena, Montana, or that said store building where said defend-

ant took said goods was the store building of said J. E. Landsman & Co., at said time, in any manner whatever, or at all.

3. Deny that the defendant held or retained possession of said goods under his said writ, in any manner whatever, or at all.

4. Deny that said Marcus Lissner had full or any power or authority to receive, take, hold, or dispose of, the said goods in controversy, in any manner whatever, or at all; and deny that said Marcus Lissner took said goods from defendant by virtue of any valid or legal authority whatever.

5. Deny, on information and belief, that said defendant, in all or any acts concerning the premises, acted solely or at all in his official capacity, or in the performance of any duties enjoined upon him by law.

6. Deny, on information and belief, that said defendant has no interest of any kind or character in the outcome of this action of a personal nature, or that the real parties who are interested therein as parties defendant, are the parties named as in defendant's answer, as plaintiffs in said alleged attachment suits, or that any person whatever, other than this defendant, is a proper, necessary or material party defendant in this action.

Wherefore, plaintiffs, having fully replied, prays for judgment as demanded in their said complaint.

CULLEN, SANDERS & SHELTON,
Attorneys for Plaintiffs.

[Verified.]

Counsel for defendant asks leave to file an amendment to his answer, to which counsel for plaintiffs objected. Motion granted, and amendment filed; to which ruling plaintiffs then and there excepted, and said exception was allowed by the court.

And afterwards, to-wit: on the said 22d day of May, A. D. 1891, the defendant filed his amendment to his answer herein, which said amendment is in the words and figures following:

Now comes the defendant, and by way of amendment to his answer heretofore filed in this cause on December 3, 1890, presents and avers the following:

I.

And for further defense this defendant alleges: Upon information and belief, that at the date of the execution of said alleged bill of sale, to-wit: On the 18th of March, 1889, said J. E. Landsman, or J. E. Landsman & Co., were not indebted to said William Oliver, agent, in any sum exceeding the sum of seven thousand seven hundred forty-one and eighty-seven-one-hundredth dollars, and that immediately after the execution of the said alleged bill of sale, and upon the same day, the said Oliver used the same fraudulently and falsely to gain a secret advantage against other creditors of the said J. E. Landsman & Co., to protect and insist upon the payment of and through the same to coerce the payment of fraudulent claims without actual existence against the said J. E. Landsman & Co., and then and there with the design of falsely and fraudulently making a large sum of money out of said bill of sale at the expense of the said J. E. Landsman & Co., and the creditors of the said firm, refused to surrender the same upon a tender to him, and an offer to pay the amount so due him in his representative capacity, and then and there declared that he would not surrender the same until the sum of twelve thousand five hundred dollars was paid over to him, thereby using and intending to use the said alleged bill of sale to work a fraud and extort money; and that in and about all of the foregoing acts said Oliver was acting and assuming

to act solely in his representative capacity and as the agent of these plaintiffs.

TOOLE & WALLACE,
Attorneys for Defendant.

And afterwards, to-wit: on the 23d day of May, A. D. 1891, plaintiffs filed their replication to said amendment to said answer, which said reply is in the words and figures following, to-wit:

Now come the above named plaintiffs, and for reply to the amendment to the answer herein filed:

Denies, that on the 18th day of March, 1889, said J. E. Landsman, or J. E. Landsman & Co., were not indebted to said William Oliver, agent, in any sum exceeding the sum of $7,741.87, or that said J. E. Landsman, or said J. E. Landsman & Co., were indebted to said William Oliver, agent for the plaintiffs, in any sum less than the sum mentioned in the complaint.

Deny, that immediately after the execution of the bill of sale, or upon the same day, or at any other time, said Oliver used the same fraudulently or falsely to gain a secret advantage against other creditors of said J. E. Landsman & Co., or in any other manner whatever.

Deny, that to protect and insist upon the payment of, or through the same to coerce the payment of fraudulent claims without actual existence against the said J. E. Landsman & Co., or then or there, with the design of falsely and fraudulently making a large sum of money out of said bill of sale at the expense of said J. E. Landsman & Co., or the creditors of the said firm, refused to surrender the same upon a tender to him, or an offer to him to pay the amount due him in his representative capacity, or then or there declared that he would not surrender the same until the sum of $12,500 was paid over to him, in any manner whatever, or that any sum was tendered to him, or any sum offered to him,

or that any one ever offered or tendered to him the amount due him as the agent of plaintiffs, or any of them, or that said Oliver used or intended to use the said bill of sale to work a fraud or extort money in any manner whatever, or that in or about all of said alleged acts said Oliver was acting or assuming to act solely in a representative capacity, or as the agent of the plaintiffs in any manner whatever, or at all, or that he did any of said alleged acts as the agent of the plaintiffs, or as their representative, in any manner whatever, or at all.

Wherefore, plaintiffs pray judgment against said defendant, as demanded in their complaint.

CULLEN, SANDERS & SHELTON,
Attorneys for Plaintiffs.

And afterwards to wit, on the 5th day of June, 1891, the following further proceedings were had and entered of record herein, in the words and figures following, to wit:

Friday, June 5, 1891, 10 a. m.

Court convened pursuant to adjournment.

Present—The Honorable Hiram Knowles, United States District Judge for the District of Montana.

No. 89—This cause came on this day regularly for trial, Messrs. Cullen, Sanders & Shelton appearing as counsel for plaintiffs, and Messrs. Toole & Wallace appearing for defendant.

(Jury empaneled and witnesses sworn.) Defendant thereupon filed his motion for a non-suit. After argument the further hearing of said cause was continued until June 6th, 1891, at 10 a. m.

And afterwards the following further proceedings were had and entered of record herein in the words and figures following, to wit:

Fifty-first day, April term, A. D. 1891. Saturday, June 6th, 1891, 10 a. m. Court convened pursuant to adjournment.

Present—The Honorable Hiram Knowles, United States District Judge for the District of Montana.

Counsel present as before and trial resumed. After argument, motion submitted to the court for consideration and decision. Whereupon motion overruled; to which ruling defendant then and there duly excepted, and said exception was allowed.

Defendant asked leave to correct his motion, in that it appear and be considered a motion for the court to instruct the jury to find a verdict for the defendant, instead of a motion for a non-suit. Counsel for plaintiffs not objecting, motion allowed and said motion so corrected, and it was here considered that the ruling of the court, and exception noted, be the same as made and taken to the motion for non-suit. Counsel for plaintiffs here asked leave to file amendment to replication. Counsel for defendant objected. After argument of counsel, motion allowed and amended replication filed, and defendant's objection thereto filed. (Documentary evidence and oral evidence being introduced.) Whereupon further hearing continued until Thursday, June 9th, 1891, at 2 p. m.

And afterwards to-wit, on the said 6th day of June, A. D. 1891, the plaintiffs herein filed their amended replication, which said amended replication is in the words and figures following, to-wit:

Now comes the above named plaintiffs, and by leave of the court first had and obtained files this their amended replication to the answer of the defendant:

Deny on information and belief that said defendant levied upon said goods and chattels by virtue of the writs of attachment issued out of the District Court of the First Judicial District of the Territory of Montana, as in said answer set forth; but on information and belief allege that said defendant so levied upon the same and took said goods and chatels out of the possession of these

plaintiffs by virtue of a writ of attachment issued out of said District Court in the case wherein the First National Bank of Helena was plaintiff, and J. E. Landsman & Co. were defendants, and none others.

II.

Deny that said defendant took said goods and chattels, or any thereof, from the possession of the said J. E. Landsman or J. E. Landsman & Co., or that he took the same in the store building of said J. E. Landsman & Co., or that said store building where said defendant took said goods was the store building of said J. E. Landsman, or J. E. Landsman & Co., at the date of the levy of said attachments, or any or either thereof.

III.

Deny that said defendant held or retained possession of said goods, or was entitled to the possession thereof, under the said writ of attachment, until the 20th day of April, 1889, or for or during any other period whatever.

IV.

Deny that said Marcus Lissner had full or any power or authority to receive, take, hold or dispose of the said goods in controversy, in any manner whatever, or at all, but admit that the said Marcus Lissner received said goods from said defendant and disposed of the same.

And plaintiffs allege that if said defendant seized the said goods and property in controversy under or by virtue of any writ or attachment issued out of the District Court of the First Judicial District of the Territory of Montana, within and for Lewis and Clarke County, that he seized said goods in the suit of the First National Bank of Helena, Montana, vs. J. E. Landsman and Julius Cohn, on the 18th day of March, 1889, when said goods and all of them were in the sole, exclusive and actual

possession of these plaintiffs, and that he took said goods on said day from the possession of these plaintiffs, if under any writ of attachment at all, under the writ of attachment in said suit above named; that said suit has been fully terminated and completed by the rendition of a judgment therein against said Landsman & Co., and said judgment is fully satisfied and discharged and was long prior to the commencement of this suit; that as to the levying of any writs of attachments upon said goods in the other suits mentioned in defendant's said answer, plaintiffs aver that if said defendant levied any writs of attachment upon said goods in said suits, he did so after he had wrongfully and unlawfully and forcibly seized the same, and taken and removed the same from the possession of the plaintiffs, and while said goods were so wrongfully and unlawfully in his possession and not otherwise, and that said suits mentioned in defendant's answer have each and all of them been terminated by the entry of judgments therein or otherwise, and that said Marcus Lissner, who received said property from said defendant, as defendant avers, has fully disposed of the same and said property is no longer held under or by virtue of any process of said court whatever, and is no longer in the custody or control of said court under and by virtue of any process thereof, and all interest which said court ever had in and to said property has long since ceased and terminated.

V.

Deny that said defendent in and about the seizing or holding, or disposition of said property in controversy, acted in his official capacity, in any manner whatever, or at all, or that he has no interest in the outcome of this action of a personal nature, or that the real parties interested therein, as parties defendant, are the parties

named in defendant's answer, in any manner whatever, or at all.

Wherefore plaintiffs pray judgment.

CULLEN, SANDERS & SHELTON,
Attorneys for Plaintiffs.

And afterwards, to-wit, on the 9th day of June, 1891, the following further proceedings were had and entered of record herein in the words and figures following, to-wit:

Fifty-second day, April term, A. D. 1891, Tuesday, April 9th, 1891, 2 p. m.—Court convened pursuant to adjournment.

Present—The Honorable Hiram Knowles, United States District Judge for the District of Montana.

No. 89—Maurice Wise *et al. vs.* C. M. Jefferis.

Counsel present as before, and the trial of the cause was resumed. Whereupon further hearing continued until June 10th, 1891.

And afterwards on the 10th day of June, A. D. 1891, the following further proceedings were had and entered of record, in the words and figures following:

Fifty-third day, April term, A. D. 1891. Wednesday, June 10th, 1891, 10 a. m. Court convened pursuant to adjournment.

Present—Honorable Hiram Knowles, United States District Judge for the District of Montana.

No. 89—Maurice Wise *et al. vs.* C. M. Jefferis.

Counsel present as before, and trial of cause resumed.

Defendant here asked leave to file amendment to answer; objected to by plaintiffs; after argument, motion allowed and granted, and plaintiffs then and there excepted to the ruling of the court, which exception was allowed.

After argument of counsel further hearing continued until Thursday, June 11th, 1891, at 10 a. m.

And afterwards on said 10th day of June, 1891, defendant, as by leave of court had as last above, filed his amendment to his answer herein, which said amendment is in the words and figures following, to-wit:

Now comes the defendant, and by way of amendment to his answer and amendment thereof, heretofore filed in said cause, alleges:

That at and prior to the 18th day of March, 1889, the said First National Bank, of Helena, Montana, was, ever since has been, and yet is, a banking corporation, organized and existing in the State of Montana as a national bank under the laws of the United States, and as such an actual existing creditor in good faith of the said firm of J. E. Landsman & Co., upon an actual indebtedness to it then owing in a sum of seven thousand five hundred and thirty-eight and twenty-three one-hundredths dollars, and in a sum yet owing of seven hundred and fifty dollars, and six thousand eight hundred and thirty-eight and twenty-three one-hundredths dollars, of said amount represented the indebtedness sued for and named in the writ of attachment, under which the defendant took the property described in the complaint.

TOOLE & WALLACE,
Attorneys for Defendant.

And afterwards, to-wit, on said 10th day of June, 1891, the plaintiffs filed their reply to the amendments of defendant, which said reply is in the words and figures following, to-wit:

And now comes the above named plaintiffs and for reply to the amendment of defendant filed herein on the 10th day of June, 1891, and denies that the said defendant ever at any time seized or took the property described in the complaint under any valid writ of attachment issued out of any court of competent jurisdiction in any suit wherein the First National Bank, of

Helena, was plaintiff, and J. E. Landsman & Co. were defendants, or that said defendant took said property under any valid writ of attachment whatever.

Wherefore, plaintiffs pray for judgment as demanded in the complaint.

CULLEN, SANDERS & SHELTON,
Attorneys for Plaintiffs.

And afterwards, on the 11th day of June, 1891, the following further proceedings were had and entered of record herein in the words and figures following, to-wit :

Fifty-fourth day, April term, A. D. 1891, Thursday, June 11th, 1891, 10 a. m.—Court convened pursuant to adjournment.

Present—The Honorable Hiram Knowles, United States District Judge for the District of Montana.

No. 89—Maurice Wise *et al. vs.* C. M. Jefferis.

Counsel present as before, and hearing of cause resumed; whereupon, after the instructions of the court, the jury retire for deliberation. Objections to instructions of court made by defendant; objections overruled; and defendant then and there excepted, which exception was allowed. The jury subsequently returned into court, and being called, and all being present, render the following verdict:

"IN THE CIRCUIT COURT OF THE UNITED STATES,
Ninth Circuit, District of Montana.

Maurice Wise *et al.* plaintiffs, *vs.* Charles M. Jefferis, defendant.

"We, the jury in the above entitled action, find for the plaintiffs, and find the value of the property in controversy to be the sum of seventy-seven hundred and forty-one and eighty-one one-hundredths dollars for Chicago plaintiffs, and one hundred and eight and eighty-five

one-hundredths dollars for Turner & Burley; amounting in all to seven thousand eight hundred and fifty and sixty-six one-hundredths ($7850.66) dollars; and find plaintiff's damages for the detention of said property to be the sum of twelve hundred and twenty-five and sixty-nine one-hundredths ($1225.69) dollars for Chicago plaintiffs, and seventeen and ten one-hundredths ($17.10) dollars for Turner & Burley. Amount of damages in all, twelve hundred and forty-two and seventy-nine one-hundredths ($1242.79) dollars.

"J. J. FANT, Foreman."

Which said verdict was then and there filed.

Counsel for defendant objected to the verdict of the jury and the objection was overruled, to which ruling defendant then and there excepted, and said exception was allowed.

Counsel for plaintiffs here asked that judgment be entered herein in accordance with the verdict, which said motion was granted and judgment ordered entered herein accordingly.

Counsel for defendant here made oral motion for a new trial herein, based upon the minutes of the court and bill of exceptions to be hereafter filed, and the same was thereupon noted for argument.

And afterwards, to-wit, on said 11th day of June, judgment was duly entered herein in accordance with said verdict, which said judgment is in the words and figures following, to-wit:

This day this cause came on regularly for trial, the said parties appearing by their attorneys, a jury of twelve persons were regularly empaneled and sworn to try said cause; witnesses on the part of the plaintiffs and defendant were duly sworn and examined, and after hearing the evidence and argument of counsel and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court, and,

being called, answered to their names, and say they find a verdict for the plaintiffs, which said verdict is in the words and figures following, to-wit: "We, the jury in the above entitled action, find for the plaintiffs. And find the value of the property in controversy to be the sum of seventy-seven hundred and forty-one and eighty-one one-hundredths ($7741.81) dollars for Chicago plaintiffs, and one hundred and eight and eighty-five one-hundredths ($108.85) dollars for Turner & Burley; amounting in all to seven thousand eight hundred and fifty and sixty-six one-hundredths ($7850.66) dollars: and find plaintiffs damages for the detention of said property to be the sum of twelve hundred and twenty-five and sixty-nine one-hundredths ($1225.69) dollars. for Chicago plaintiffs, and seventeen and ten one-hundredths ($17.10) dollars, for Turner & Burley: amount of damages in all, one thousand two hundred and forty-two and seventy-nine one-hundredths ($1242.79) dollars.

"J. J. FANT, Foreman."

Wherefore. by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that the said plaintiffs do have and recover of and from the said defendant, possession of the goods and chattels set forth and described in plaintiffs complaint as follows, to-wit:

Here were described all.the articles sued for.

And afterwards the following further proceedings were had and entered of record herein in the words and figures following, towit:

Sixty-third day, April term, A. D. 1891, Monday August 10th, 1891, 10 a. m.—Court convened pursuant to adjournment.

Present—Honorable Hiram Knowles, United States District Judge for the District of Montana.

No. 89—Maurice Wise *et al. vs.* Chas. M. Jefferis.

It is ordered that the undertaking on writ of error herein be fixed in the amount of eleven thousand ($11,000) dollars.

And afterwards, to-wit, on the 11th day of Agust, A. D. 1891, the following further proceedings were had and entered of record in the words and figures following, to-wit:

Sixty-fourth day, April term, A. D. 1891, Tuesday, August 11th, 1891, 10 a. m.—Court convened pursuant to adjournment.

Present—Honorable Hiram Knowles, United States District Judge for the District of Montana.

No. 89—Maurice Wise *et al. vs.* Chas. M. Jefferis.

Counsel for defendant, in open court, presented and filed the petition of defendant herein for a writ of error, and thereupon it is ordered that said writ of error be allowed, and citation allowed and signed, and said writ of error is allowed and citation allowed and signed.

And thereafter, upon good cause being shown therefor, the time for the return of writ of error and citation herein is enlarged and extended until the 11th day of October, A. D. 1891.

And afterwards, to-wit, on the said 11th day of August, A. D. 1891, the defendant herein filed his bond herein, which said bond is in the words and figures following, to-wit:

Know all men by these presents, that we, Charles M. Jefferis, as principal, and Samuel T. Hauser and Edward W. Knight, as sureties, each and all of the city of Helena, County of Lewis and Clarke, and State of Montana, are held and firmly bound unto Maurice Wise and Jacob Bauland, surviving partners of the firm of Austrian, Wise & Co.; Henry G. Foreman, trustee for Meyer E. Lindauer, Benjamin Lindauer, Seligman Lindauer, and Aaron Rosenblatt, co-partners under the firm name and style of Lindauer Bros. & Co.; Bernhard Cahn, Charles

Cahn, Joseph Cahn, Louis Wampold and David Wallach, co-partners under the firm name and style of Cahn, Wampold & Co.; Charles W. Turner and Andrew F. Burleigh, co-partners under the firm name and style of Turner & Burleigh, in the sum of eleven thousand dollars, to be paid to the defendants in error last aforesaid, for the payment of which well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals this 11th day of August, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas, the above named Charles M. Jefferis has prosecuted a writ of error to the United States Circuit Court of Appeals of the Ninth Circuit to reverse the judgment rendered in the above entitled suit by the judge of the Circuit Court of the United States, of the Ninth Circuit, for the District of Montana,

Now, therefore, the conditions of this obligation are such that if the above named Charles M. Jefferis shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make said writ of error good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

C. M. Jefferis,
Samuel T. Hauser,
Edward W. Knight.

State of Montana, }
County of Lewis and Clarke, } ss.

Samuel T. Hauser and Edward W. Knight, sureties upon the foregoing bond, being duly sworn, each for himself makes oath and says: That he is worth the amount named as the penalty therein over and above all

his just debts and liabilities, exclusive of property by law exempt from execution.

SAMUEL T. HAUSER,
EDWARD W. KNIGHT.

Subscribed and sworn to before me this 11th day of August, 1891.

[SEAL.] GEO. H. HILL,
Notary Public.

The within bond and sureties are hereby approved and a supersedeas and stay of execution ordered this 11th day of August, 1891.

HIRAM KNOWLES,
U. S. District Judge.

And afterwards to-wit on the 26th day of September, A. D. 1891, the following further proceedings were had and entered of record herein in the words and figures following, to-wit:

For good cause unto the court shown, and in accordance with consent of parties therefor, it is hereby ordered that time for the preparation and transmission of the record to the court of appeal in the above action, be extended until the 25th of October, 1891, and that the order heretofore made with reference thereto extending the time until October 11th, be, and the same is hereby extended a period of twenty days therefrom.

Dated this 26th day of September, 1891.

HIRAM KNOWLES,
Judge.

And afterwards, to-wit, on the 6th day of October, A. D. 1891, defendant's bill of exceptions heretofore presented was allowed, signed and filed, which said bill of exceptions is in the words and figures following, to-wit:

I.

Be it remembered that on the trial of this cause, had before the court and a jury on the 5th day of June, 1891, plaintiffs read in evidence the deposition of William Olliver, which said deposition had been taken at the instance of the plaintiffs, and having begun the reading thereof, read all thereof of the direct interrogatories, save Interrogatory 31, and answer thereto, as follows, to-wit:

Interrogatory 31—If you had any conversation with J. E. Landsman since that time, state what it was, giving it in full? A. I had no conversation with Landsman from the time he left the store after giving possession to me for at least a day or two. The next conversation I had with him was after the sheriff had dispossessed me. I met Landsman in Turner's office. Mr. Lissner was there, and whatever conversation I had with Landsman I had in the presence of Mr. Turner. A question of settlement was discussed, and as to Mr. Lissner's buying the claims I represented and settling with Landsman's other creditors, I said that he might make any settlement he wished with the others, but for those whom I represented I was prepared to act at once, and they must be paid in full. That there was no reason why the claims I represented should be settled for anything less than their face; that the claims were *bona fide*; that the security given therefor was ample, and that we intended to hold the sheriff or the bank liable for the full amount thereof, and for damages and costs, and that under those circumstances, Mr. Turner advising that in the presence of Landsman we could certainly hold the bank or the sheriff, I did not see why we should take anything less than the full amount of our claims. I met Mr. Landsman in Helena a few times thereafter, but excepting to pass the compliments of the day, had no conversation with him, because I had been advised by Mr. Turner that Landsman was threatening to take the side of the bank,

and that I should therefore be guarded, and accordingly abstain from conversing with Mr. Landsman. When Mr. Landsman was in Chicago, since this litigation began, I was on my summer vacation, and I did not see him.

When counsel for plaintiffs came to Interrogatory 31 of the deposition of William Olliver, he stated to the court that said interrogatory, and the answer thereto, consisted of matters which should properly be introduced in rebuttal, and that he desired to omit the same in presenting their case in chief, which request was by the court granted.

The defendant thereupon moved the court that plaintiffs be required to read all of the direct interrogatory and answer thereto.

Which said motion was by the court overruled, to which ruling the defendant then and there duly excepted.

And thereafter counsel for defendant offered in evidence said Interrogatory 31, and the answer thereto, as part of the defense in said action.

And thereafter, during the trial of said cause, counsel for plaintiffs read said interrogatory and the answer thereto in rebuttal, without objection on the part of the defendant.

HIRAM KNOWLES,
Judge.

Be it remembered, that on the trial of the above cause, had before the court and a jury on the 5th day of June, 1891, plaintiffs offered in evidence and read the deposition of one Andrew Burleigh, which said deposition had been taken at the instance of the plaintiffs, and having begun the reading thereof read all of the interrogatories in the said deposition, and all of the answers thereto; when counsel for plaintiffs came to Interrogatory 7, and the answer thereto, he stated to the court that the last five sentences of said answer were not proper to be in-

troduced in chief, and would come in more properly in rebuttal, and asked permission of the court to omit the last five sentences, and the answer to Interregatory 7, which said permission was by the court granted, and thereupon counsel for plaintiffs read Interrogatory 7, and the answer thereto, except the last five sentences, which were omitted by permission of the court.

Which said Interrogatory 7 and the entire answer thereto is in words and figures, as follows, to-wit:

Interrogatory 7 —Give a full and complete history of all of the transactions which took place between yourself, Mr. Oliver and J. E. Landsman, from the time that you first met until his final departure, giving also a full account of the transfer of the Landsman stock of goods to Mr. Oliver and their seizure by the defendant; what claims Mr. Oliver represented and all conversations which took place between yourself and Mr. Landsman, or yourself and the defendant.

To the seventh interrogatory he saith:

In the month of March, 1889, Mr. Oliver came to Helena from Chicago, representing certain creditors of J. E. Landsman & Company, all of whom are plaintiffs in this action, I believe, except Mr. Austrian, whom I have understood to be dead. My first acquaintance with him began after Mr. Landsman had turned over and delivered to him his stock of merchandise in the Landsman store on Main street, and I think during that day and perhaps within an hour or two thereafter. Up to that point Mr. Turner had had the exclusive management of the business. He had brought suits on the various claims represented by Mr. Oliver and had procured the issuance of attachments. Those attachments were in readiness to be levied upon the stock of J. E. Landsman & Co. and other property as security for the satisfaction of any judgment the plaintiffs might recover, when Mr. Landsman and his partner, Cohen, executed and delivered

to Mr. Oliver a bill of sale of his stock and other property in preference, and put him in possession of his store with all its contents. During that day Mr. Oliver came to the office several times, and I became acquainted with him and we discussed the general features of his case. As I now remember, Mr. Oliver represented the claims of Austrian, Wise & Co., Cahn, Wampold & Co., and Henry G. Foreman, trustee for Lindauer Brothers & Co., all of Chicago, which claims aggregated in amount about eight thousand dollars, perhaps some hundreds more, or perhaps something less, I do not know exactly. In the afternoon of that day, which I believe was about the 18th of March, 1889, the sheriff took the Landsman property, being his stock of merchandise, books, book accounts, fixtures, etc., on an attachment issued at the instance of the First National Bank of Helena. Then for several days, there were negotiations pending between the bank and Mr. Oliver respecting an adjustment of matters between them, but these negotiations, so far as Mr. Oliver's attorneys were concerned, were conducted exclusively, I believe, by General Turner, and I have no personal knowledge of them, furthermore than that they were fruitless, and no arrangements were made. Numerous conversations occurred between Mr. Landsman and myself, and Mr. Landsman and General Turner, in my presence, and perhaps one or two with Mr. Oliver and between Mr. Landsman and Mr. Oliver in my presence, but all such, within, I should say, a week after the transfer by Landsman to Oliver. As nearly as I can recollect the substance of those conversations was as follows: Mr. Landsman was feeling happy over the successful feat which he considered that he had performed in turning his stock over to his Chicago creditors and in having put it in a position where his Montana creditors could not touch it. At first when the bank attached he did not seem to attach much consequence to that act,

considering that within a few days the property would be released. His demeanor gradually became more serious and he eventually regarded the situation as grave. Within about, I should say, three days after the transfer of the stock to Oliver, Mr. Landsman began to press Mr. Oliver with inquiries as what was to become of him (Landsman) and as to what disposition the Chicago creditors proposed to make of any surplus which might arise from the Landsman stock and property after their claims had been paid. I remember of being consulted in conjunction with Mr. Turner by Mr. Oliver in reference to that matter and our advice to Mr. Oliver, upon which I am confident he acted, was to the effect that he should give Mr. Landsman no assurance whatever on that subject and make him no promises. At one time I believe Mr. Landsman submitted a proposition to Mr. Oliver to take the stock and other property through the intervention of a friend, whom he thought would help him. As I remember, that was Mr. Lissner, but that matter fell through, through the indifference of Mr. Lissner. I know Mr. Lissner came up to the office once or twice, and talked to us on the subject. When Mr. Landsman found that he could get no promises from Mr. Oliver, or from General Turner, or myself, on the subject of the disposition of the surplus, and especially after it had been ascertained, much, apparently, to the surprise of everybody, that there would be a considerable surplus, his relations to us rapidly changed, and finally got to a point where he ceased his visits to the office, and, so far as I was personally concerned, ceased to have any conversation on the subject. Mr. Landsman never contended to me that he had any agreement with Mr. Oliver, that the surplus, if any, of the property which he had put in Oliver's possession should be returned to him, but he did say that Mr. Austrian, of the firm of Austrian, Wise & Co., was a particular friend of his, and

that he thought that he would protect him in his troubles.

Whereupon defendant moved the court that plaintiffs be required, having read the Interrogatory 7 and a portion of the said answer, to read the whole thereof, which motion the court declined to grant, and overruled, to which ruling the defendant then and there at the time excepted.

Counsel for plaintiffs subsequently read said omitted portions of the answer to said Interrogatory 7, in rebuttal, without objection on the part of the defendant, and said interrogatory, and the answer thereto, were read to the jury during the trial of said case by plaintiffs.

HIRAM KNOWLES,
Judge.

III.

Be it remembered, that on the trial of the above entitled action, had before a court and a jury, on the 5th day of June, 1891, the defendant, as a part of his cause, offered and introduced testimony of divers witnesses, which was given in evidence tending to sustain and support the allegations of fraud in the defendant's answer, amended answer and second amended answer, and sufficient to have required the court to have submitted that issue to the jury.

After particular evidence tending to establish all of the allegations of fraud in said pleadings contained had been introduced and given (and in support of the allegations aforesaid as to the writ of attachment under which the defendant took the said chattels) he offered and read in evidence a certain undertaking and writ of attachment, in Cause No. 4,589, of the District Court of the First Judicial District, of Lewis and Clarke County, and for the State of Montana, entitled First National Bank, of Helena, Montana, vs. J. E. Landsman & Co., it being theretofore stipulated between the plaintiffs and defendant

that a complaint in said action had been duly filed in the said cause, and summons regularly issued, which said affidavits, undertaking and writ of attachment are in words and figures as follows, to-wit:

TERRITORY OF MONTANA,)
) ss.
County of Lewis and Clarke.)

E. W. Knight, being duly sworn, says: That he is the agent and cashier of plaintiff in the above entitled action, that the defendants in the said action are indebted to said plaintiff in the sum of six thousand eight hundred and thirty dollars and fifty cents, lawful money of the United States, over and above all legal set offs and counterclaims, upon an express contract for the payment of money, to-wit:

One promissory note for $3,093, dated December 8, 1888.

One promissory note for $2,577.50, dated January 19, 1889.

One promissory note for $750, dated December 3, 1888.

One promissory note for $750, dated December 3, 1888.

That the same is now due, except the note for $2,577.50, which is due in April 19, 1889, and that the payment of the same is not secured by any mortgage, lien or pledge upon real or personal property; that said defendants are selling and disposisg of their property for the purpose of defrauding creditors.

(Signed) E. W. KNIGHT.

Subscribed and sworn to before me this 18th day of March, A. D. 1889.

(Signed) EDWARD W. KNIGHT, JR., [SEAL.]
Notary Public.

Whereas, the above named plaintiff has commenced, or is about to commence, an action in the District Court of the First Judicial District of the Territory of Montana, in and for the County of Lewis and Clarke, against the above named defendants upon a contract for the payment of money, claiming that there is due to the said plaintiff from the said defendants the sum of $6,830.50, lawful money of the United States, besides interest, and is about to apply for an attachment against the property of the said defendants as security for the satisfaction of any judgment that may be recovered therein.

Now, therefore, we, the undersigned residents of the County of Lewis and Clarke, in consideration of the premises and of the issuing of said attachment, do jointly and severally undertake, in the sum of $13,661, and promise to the effect that if the said defendants recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment in said action, that said plaintiff will pay all costs that may be awarded to said defendants and all damages which he may sustain by the reason of wrongful suing out of the attachment, not exceeding the sum of $13,661.

Witness our hands and seals, this 18th day of March, 1889.

(Signed). T. C. POWER, [SEAL.]
(Signed) H. M. PARCHEN. [SEAL.]

Whereas, the above entitled action was commenced in the District Court of the First Judicial District of the Territory of Montana, in and for the County of Lewis and Clarke, by the plaintiff in said action, to recover from the defendant in said action the sum of sixty-eight hundred and thirty-eight and twenty-three one-hundredths dollars, lawful money of the United States, besides interest at the rate of ten per cent. per annum from the 18th day of March, A. D. 1889, and costs of suit; and the necessary

affidavit and undertaking herein having been filed, as required by law,

Now, we do therefore command you, the said sheriff, that you attach and safely keep all the property of the said defendant, within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy said plaintiff's demand, as above mentioned, unless the said defendant give you security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached; in which case you will take such undertaking; and hereof make due and legal service and return.

Witness the Honorable N. W. McConnell, Judge of the said District Court, this 18th day of March, A. D. 1889.

Attest my hand and the seal of said court, the day and year last above written.

[Seal.] Signed, F. W. McConnell, Clerk.

By Leon A. LeCroix, Deputy Clerk.

And on which said writ of attachment was attached a return describing all of the articles by way of inventory sued for in the within action, and which said articles were returned as levied upon by the said writ of attachment by this defendant, Jefferis.

And thereafter the said Jefferis, having attempted to defend as such sheriff, and to set up as such aforesaid, defenses of fraud available to creditors, the court instructed the jury with reference thereto upon the proposition, as follows, to-wit:

That this sale of Landsman to Oliver for plaintiffs was void as to creditors, there has been a considerable evidence introduced upon this point which I am fearful may confuse you. The defendant had the right to present this issue upon the proof that he was acting for creditors of

said Landsman in taking possession of said property, and was authorized to seize said property by a writ of attachment duly issued from a court having jurisdiction of a pending case by an officer authorized to issue the same. But in the case in which the writ of attachment under which defendant seeks to justify, the clerk who issued the writ failed to require of the creditor, which defendant represents, the filing of such an undertaking, as was required by the statute in such cases, and such creditor did not file such undertaking. The defendant could not justify his taking of the property from plaintiffs under this writ.

He has failed, therefore, to establish an important point in his defense, namely, that the attachment proceeding under which he acted were such as is required by law. And, having failed in this point, his defense that the mortgage to Oliver for plaintiffs was fraudulent as to the creditors for whom he acted, fails, and you must not consider any of the evidence upon the point as to whether this mortgage to Oliver for plaintiffs was in fraud of creditors or not. You may feel that, considering the evidence that has been admitted in the case and the argument of counsel, you ought to consider this question, and if proper evidence had been submitted the court would have willingly called upon you to determine this question as to whether this mortgage was fraudulent as to creditors; but as the court has viewed the law, he has felt compelled to withdraw this question from you.

To the giving of which said charge by the court the defendant then and there and at the time interposed the following objections, to-wit:

To so much of the charge as relates to the question of the right of the defendant to justify under his writ in behalf of creditors, and to present the alleged fraudulent character of the bill of sale, and the alleged fraud connected therewith, upon the ground that it absolutely pre-

cludes the jury from investigating any or all of this fraud, which was properly a subject of investigation by them, and an issue which should have been submitted to them under the proofs in the case. Further, because, prior to the amendment made by the defendant to his answer during the progress of the trial plaintiffs, had introduced by way of rebuttal, the judgment in the suit of the First National Bank of Helena against Landsman, which of itself was evidence of the existence of the debt, and that this was all that was required in law to connect the sheriff with a creditor, so as to enable him to justify under the issues as they then were. Further, because the sheriff justified under a writ of attachment, and a complaint, summons, affidavit and undertaking, all of which were sufficient, with the exception of the undertaking, the insufficiency of which latter did not make the writ void but merely voidable, at the instance of the defendant upon a direct proceeding some time prior to his answering, and there being no proof of such proceeding having been instituted, the writ was no longer even voidable, and was a complete justification to the officer in all collateral proceeding in any event. Further, because the officer would have been bound to serve the process under these circumstances, the writ being regular upon its face; and finally, because the sheriff was entitled to avail himself of all of this proof upon the question of fraud, and entitled him to justify as in the attitude of a creditor, and because under the issues, as the proofs were introduced, the regular issuance of the writ was admitted.

Which said objections were then and there and each and all by the court overruled, and the said instruction above quoted thereupon given to the jury.

Whereupon, and after deliberation by the jury, they returned their verdict in favor of plaintiffs and against the defendant in the sum of ———— dollars, upon which

verdict afterward judgment was rendered by the court in accordance therewith against the defendant.

HIRAM KNOWLES,
Judge.

IV.

Be it remembered, that on the trial on the above cause had before the court and a jury on the 5th day of June, 1891, the defendant, as sheriff, justifying under a writ of attachment issued by creditors of Landsman & Co., and the plaintiffs claiming as vendee of Landsman & Co., in possession under a bill of sale given as security for their indebtedness, and the defendant disputing the question as to whether there was an immediate delivery of possession and an actual change of possession, and an open and notoriously exclusive possession in said plaintiffs, or their agents, sufficient to make the transfer valid as to creditors, and whether the alleged possession taken by said Oliver, agent of plaintiffs, was that character of possession which would be valid as against other creditors, and the defendant having theretofore introduced his return upon the writ of attachment, upon which he acted, which return was in words and figures as follows, to-wit:

I, Charles M. Jefferis, sheriff of Louis and Clarke County, do hereby certify that under and by virtue of the within and hereunto annexed writ of attachment by me received on the 18th day of March, 1889, I did, on the 18th day of March, 1889, attach the following described property in the possession of William Oliver (here was described the property in controversy), and attached the same by taking into my custody and putting a keeper in charge.

(Signed) CHARLES M. JEFFERIS,
Sheriff.

And thereafter Jacob Landsman, being called as a witness on the part of the defendant, was interrogated

as to who was in possession of the store and property claimed under the bill of sale at the time of the seizure of the goods by defendant, to which question plaintiffs counsel objected, for the reason that the defendant was concluded by his return as sheriff, which objection was sustained by the court, which ruling the defendant then and there and at the time duly excepted.

And thereafter the court charged the jury upon the said point as follows, to-wit :

But the defendant has returned upon the writ of attachment under which he claims to have taken this property, that he took it from the possession of Oliver, who was the agent of plaintiffs. This, I instruct you, would preclude him from maintaining that Oliver was not in possession of the goods at the time he took them.

To which said charge and instruction, the defendant objected then and there and at the time upon the following grounds, to-wit:

The defendant objects to so much of the charge as relates to the effect of the defendant's return upon his writ of attachment, as to preclude him from contending that Oliver was not in possession of the goods at the time he took them, so far as possession in those goods is concerned, for the reason that the charge concludes, as to the question of delivery of possession, its voluntary character, and cuts off the examination by the jury into the conflicting evidence upon the question as to how the bill of sale was signed; also, because it precludes investigation by the jury into the question as to whether the possession was unequivocal, actual or exclusive; and further, because the sheriff, defendant in a representative capacity on behalf of creditors, justifies not in his own right, but in the right of others, as to which defense he may not be precluded by his return; and further, because the return is only conclusive as to those matters which the law requires to be set forth therein, and his return as to pos-

session not being a necessary part of the return would not conclude the officer as defendant, or in his representative capacity.

Which said objections were then and there by the court overruled, and the charges above quoted thereupon given to the jury.

Whereupon, and after deliberation by the jury, they returned their verdict in favor of plaintiffs and against the defendant; upon which verdict judgment was afterwards rendered by the court in accordance therewith.

HIRAM KNOWLES,
Judge.

V.

Be it remembered, that upon the trial of the above cause had before the court and a jury on the 5th day of June, 1891, the defendant as sheriff, justifying under the writ of attachment issued by creditors of Landsman & Co., and the plaintiff claiming as vendee of Landsman & Co., in possession under a bill of sale given as security for their indebtedness, and the defendant disputing the question as to whether there was an immediate delivery of possession and an actual change of possession, and an open and notoriously exclusive possession in said plaintiffs or their agents, sufficient to make the transfer valid as to creditors, and whether the alleged possession taken by said Oliver, agent of plaintiffs, was that character of possession which would be valid as against other creditors, and the defendant having theretofore introduced his return upon the writ of attachment, upon which he acted, which return is in words and figures as follows, to-wit:

I, Charles M. Jefferis, sheriff of Lewis and Clarke County, do hereby certify that under and by virtue of the within and hereunto annexed writ of attachment by me received on the 18th day of March, 1889, I did, on the 18th day of March, 1889, attach the following described

property in the possession of William Oliver (here was described the property in controversy), and attached the same by taking into my custody and putting a keeper in charge. (Signed)

CHARLES M. JEFFERIS.

And testimony having been offered and introduced in evidence, tending to show that the only notices posted by the plaintiffs' agent were signed simply "William Oliver, Agent," and were signed so in ink under a printed letter head of J. E. Landsman & Co., and there being some conflict in evidence on the latter point; also, that there was no changes of sign or any outward evidence given save the signature of Oliver, agent, and the other changes referred to in the instructions of the court hereinafter set forth.

And thereupon, at the conclusion of said case, the court charged the jury upon the said point as follows, to-wit:

In support of this claim they have introduced in evidence a bill of sale of the said property. This bill of sale, according to the evidence of the witnesses of the plaintiffs, Oliver and Turner, and the witness for the defendant, Landsman, who executed the same, was given as a security to William Oliver for the benefit of plaintiffs and as their agent. Being made as a security, it was only a chattel mortgage. It was necessary that Oliver should, at the very instant of receiving the possession of this bill of sale, remove all the signs of Landsman from the building in which the property in dispute was situated. He was not required to do any other acts than was practicable, under the circumstances, to show that he had taken possession of the said property. He was entitled to a reasonable time in which to make all the changes necessary to show that Landsman had ceased to have any control over the property. There has been evidence in this case that William Oliver, as the agent of the plain-

tiffs, procured a key to the store in which said goods were, whether from Landsman or not, seems to be disputed; that he discharged one clerk who had been in the employ of Landsman and employed one of those who had been in his employ and another who had not been in his employ; that he excluded the defendant from any participation in the possession of said goods, and proceeded to sell and dispose of some of the said property, and that he stuck up some notices showing that he had charge of the store as agent. These facts, if true, would justify you in finding that there had been an actual change of possession of said property.

And thereupon, and at the time of the giving of the said charge, the defendant objected thereto upon the following grounds, to-wit :

So much of the charge as relates to the matter set forth to be sufficient as showing an evidence of the transfer of the possession of the property, is objected to, in that it takes no consideration of the notice posted as having the signature of William Oliver, agent, under the printed letter head of J. E. Lansman & Co., and does not submit the question as to whether such notices would be ambiguous or equivocal or no ; also, because it is insufficient as to the acts necessary to evidence such a change, in that it does not involve the question of these notices ; also, because there was a conflict in the testimony as to what these notices showed, and as to for whom, from the notices themselves, he would be deemed to act as agent ; also, because the charge does not submit to the jury the question as to whether there had been a reasonable time elapsed in which to accomplish the removal of the outer signs upon the building ; also, because it does not submit the question of other essential acts, such as to apprise how a delivery in unequivocal terms of the change, and because it involves a statement of the conclusions from the evidence, which ignores the

conflict in testimony as to whether the possession was joint or several in Oliver, and also as to whether there had been any delivery of possession, and because the same involves a statement of the conclusions from conflicting evidence, to the jury.

HIRAM KNOWLES,
Judge.

Which said objections were by the court then and there overruled and the said charge above quoted given to the jury, which action of the court defendant then and there at the time duly excepted, and presents herewith his bill of exceptions therefor.

VI.

Be it remembered, That upon the trial of the above cause had before the court and a jury on the 5th day of June, 1891, Jacob E. Landsman, being called as a witness for the defendant, stated among other things that at the time the bill of sale was given the claims which it was intended to secure were enumerated to him, and that they were simply and solely the claims of the Chicago creditors, and that at the time of the execution of the bill of sale the claim of Turner & Burleigh was not mentioned at all as being secured or referred to in any way, and was for the first time spoken of afterward in the afternoon of the same or following day in the office of Turner & Burleigh, but the bill of sale in the case signed by Landsman showed that it was executed to secure some indebtedness of Landsman to Turner & Burleigh.

And thereafter and in charging the jury the court instructed the jury as follows, to-wit:

There is no dispute but that Landsman or Landsman, Co. owe the Chicago creditors $7741.81, but there is some dispute as to the amount Landsman owed Turner & Burleigh. Turner claims that the amount which increased this $7741.81 to $8,500 was what he considered

at the time would cover the amount that Landsman owed his firm, which would be $758.31. This amount was all that can be said to have been secured by this mortgage. But Landsman says that he did not owe them any such amounts, that he owed them some small amounts, and was to pay them $250 in the case he was prosecuting against Thompson for damages if a judgment was obtained against Thompson to the amount of $5000. As to how much Landsman owed Turner & Burleigh is a question for you to determine from the evidence.

And this was all of the said charge of the court upon that point, to which charge the defendant then and there and at the time objected upon the grounds following, to-wit:

Also to so much of the charge as related to the Turner & Burleigh debt, in that it involves a promise that, for something, Turner & Burleigh were entitled to be secured by this bill of sale, and does not submit to the jury the point controverted in the evidence as to whether or not any of the Turner & Burleigh indebtedness was secured by the bill of sale as it was originally executed.

Which objections were then and there by the court overruled, to which ruling of the court the defendant then and there and at the time duly excepted, and thereupon the said charge as above quoted was given to the jury by the court, and the defendant herewith presents this his bill of exceptions therefor.

HIRAM KNOWLES,
Judge.

VII.

Be it remembered, that upon the trial of the above cause had before the court and a jury on the 5th day of June, 1891, defendant offered in evidence a certain petition for the appointment of a receiver, and order appoint-

ing one Marcus Lissner as the receiver of the property, which was the subject matter of this action, the said receiver's oath and bond, and the complaint and summons in the said action wherein said receiver was appointed, being Case No. 4604 of the District Court of the First Judicial District of the State of Montana, in and for Lewis and Clarke County, which papers last aforesaid were in words and figures as follows, to-wit: Save and except the complaint and summons, which complaint and summons was an ordinary complaint in assumpsit by Max Sternberg *vs.* J. E. Landsman for $1996.00, sufficient in form, and which said summons was a sufficient summons and notification upon the said cause of action.

Your petitioner, the above named plaintiff, hereby respectfully represents unto the court:

1. That he is a judgment creditor of the said defendant, J. E. Landsman, in the sum of ———— dollars, damages, and ———— dollars, costs.

2. That heretofore, to-wit, on the 18th day of March, A. D. 1889, the First National Bank of the City of Helena, commenced suit against the defendant, J. E. Landsman, and one Julius Cohen, theretofore a co-partner of the said J. E. Landsman, and by proper proceedings procured a writ of attachment, which the said bank caused to be levied against the goods in the possession of the said J. E. Landsman, in the store at that time occupied by him, on the east side of North Main street.

3. That prior to said attachment, the said J. E. Landsman had purchased all the interest of his said co-partner, Julius Cohen, in and to said stock of goods.

4. That subsequent to the levy of said attachment by said First National Bank, the following attachments were levied in the order hereinafter named, that is to say:

William Steinhart, Marcus Lissner, this plaintiff, M. Rockman, Argersinger & Co., Desert Woolen Mills Co., Schloss Brothers & Co., Falkenberg & Lederer, A. M.

Herod & Co., Henry Jonas, George H. Atwell, L. Marks & Sons, Portage Hosiery Co., J. E. Lee & Co.

5. That the sheriff of Lewis and Clarke County is now in possession of said stock of goods, in the store formerly occupied by said Landsman, and that the expenses attendant upon the possession of said sheriff, amount to ———— dollars per day.

6. That your petitioner verily believes that if said stock of goods is closed out and sold by the said sheriff of Lewis and Clarke County, under execution issued after judgment in said attachment suit, there will not be sufficient realized therefrom to pay more than the costs and expenses of such sales and the attachments of the First National Bank and William Steinhart.

7. That your petitioner verily believes that if a receiver should be appointed by this court to take possession of said property and sell the same under the order of the court to the best advantage of the attaching creditors, sufficient money could be realized to pay a great proportion of the claims of said attaching creditors, and that it is for the best interests of said attaching creditors to have such receiver appointed, thereby protecting the property of said debtor for said creditors and realizing more from said estate than could possibly be realized in any other manner.

8. That the attorneys for the respective attaching creditors have executed a stipulation, which is hereto attached and made a part of this petition.

9. That Marcus Lissner is a fit and proper person to be appointed receiver of said estate.

10. That the goods covered by said attachments, is of the value of about twenty-two thousand dollars.

Wherefore, your petitioner prays that Marcus Lissner may be appointed receiver of all and singular the goods, chattels, credits and effect of the said defendant, J. E. Landsman, and that said receiver be directed by order of

this court to enter upon and take possession of all and singular the stock of goods, book accounts and other assets so attached, as hereinbefore recited, and proceed to sell said goods to the best advantage for the attaching creditors, either at public or private sale, by wholesale or retail, according as in his judgment, it will be for the best interests of said attaching creditors; to collect the accounts, notes, and other choses in action and to report his doings in the premises to the next term of this court, at as early a day therein as practicable, and pay the money received from the sale and closing out of said estate, into this court, to be distributed by this court to the respective parties, as their several interests may appear, in accordance with the priorities gained by said attaching creditors, by the levy of their several attachments.

And your petitioners will ever pray.

(Signed.)

McConnell, Carter & Clayberg,
Attorneys for Petitioner.

Upon reading and filing the petition of Max. Sternberg, the plaintiff in the above entitled action, and the stipulation duly signed by the attorneys for all of the attaching creditors of the stock formerly owned by J. E. Landsman, of the City of Helena, and it appearing therefrom that this is a fit and proper case in which to appoint a receiver, to take charge of all, and singular the goods, property, credits and effects of the said J. E. Landsman, now in the possession of the sheriff of Lewis and Clark County, under attachments as stated in said petition and stipulation, and it further appearing that Marcus Lissner is a fit and proper person to be appointed as such receiver,

Now, therefore, it is hereby ordered that Marcus Lissner be, and he is hereby appointed as receiver to take charge of the stock of goods, book accounts and all other assets of J. E. Landsman, of the firm of J. E. Landsman

& Co., consisting of J. E. Landsman and Julius Cohen; that the receiver shall proceed to sell the goods and chattels so taken possession of by him, as such receiver, under this order, to the best advantage for the attaching creditors named in the petition herein, and in said stipulation, and any other attaching creditors who have claims upon said property, either at public or private sale, at retail or wholesale, according as in his judgment it will be for the best interests of said creditors; and to collect the accounts, notes and other choses in action of said defendant; that he shall report his doings in the premises to the next term of this court at as early a day therein as practicable; that when said stock of goods and effects are disposed of, and the money collected, to pay the same into this court, taking the receipt of the clerk of this court therefor.

That upon filing by the said receiver of his said oath, as required by the statute, and an undertaking with two sureties in the sum of twenty-five thousand dollars, to be approved by the clerk of this court, conditioned as required by the statute, that the said receiver be entitled to take possession of all and singular the said stock of goods, and carry out the terms of this order.

It is hereby further ordered that upon the presentation to the sheriff of Lewis and Clarke County, of a certified copy of this order, the said sheriff is hereby directed to turn over to the said receiver, all and singular, the property in his possession under said attachments, rendering to the said receiver a statement of whatever costs or charges he may have against said stock of goods, as such sheriff, because of retaining the custody thereof under said attachments, which shall be paid by said receiver out of the first money received by him from the sale of said goods.

Helena, M. T., April 18th, 1889.

HENRY N. BLAKE, Judge.

Attest: W. F. PARKER, Clerk.

Territory of Montana, } ss.
County of Lewis and Clarke. }

Marcus Lissner, being duly sworn, on his oath says: That he will well and faithfully perform the duties of receiver in the above entitled action, and will obey all the order of the courts made therein.

Marcus Lissner.

Subscribed and sworn to before me this 19th day of April, A. D. 1889.

George O. Freeman,
Notary Public Lewis and Clarke County, Montana Territory.

Know all men by these presents, that we, Marcus Lissner as principal, and S. T. Hauser and T. H. Kleinschmidt as sureties, are held and firmly bound unto the above named plaintiff and defendant, and all other attaching creditors of the defendant, in the sum of twenty-five thousand dollars, to be paid to the said plaintiff or defendant or other attaching creditors, for which payment well and truly to be made, we, and each of us, bind ourselves jointly and severally, and our respective heirs, executors and administrators, firmly by these presents.

Signed, sealed and dated this 18th day of April, A. D. 1889.

The condition of the above obligation is such that whereas, by an order of the judge of said court, made on this 18th day of April, A. D. 1889, in the above entitled action, it was, among other things, ordered that the above bounden Marcus Lissner be appointed receiver of all of the property, equitable interests, choses in action, and effects of the defendant, J. E. Landsman, which had been theretofore attached by the sheriff of Lewis and Clarke County, in divers suits against the said Landsman, and his former partner, Julius Cohen, and that he be vested with all the rights and powers of a receiver in chancery.

upon his filing a bond for the faithful discharge of his duties as receiver in said action.

Now, therefore, if the said Marcus Lissner shall well and faithfully discharge the duties of receiver in said action, and obey the orders of the court therein, then this obligation to be void; otherwise in full force and effect.

MARCUS LISSNER. [SEAL.]
S. T. HAUSER. [SEAL.]
T. H. KLEINSCHMIDT. [SEAL.]

And further offered to prove in connection therewith that under and in accordance with the mandate of the said order, and on the 19th day of April, 1889, this defendant had turned over the said property and the whole thereof to the said receiver, so named, and never since has held or possessed the same.

To the introduction of which said papers in evidence plaintiff objected (upon the ground that if a portion of the record in the case was to be introduced the entire record should go in, and for the further reason that said papers are irrelevant and immaterial under the issues). Which said objection was by the court sustained, and to which said ruling of the court defendant then and there duly excepted, and presents this his bill of exceptions thereto.

HIRAM KNOWLES,
Judge.

VIII.

Be it remembered, that upon the trial of the above cause, had before the court and a jury on the 5th day of June, 1891, and that the plaintiffs have sued in replevin to recover the possession of the goods and chattels the subject matter of this action, and the defendant having attempted to justify the taking, under writs of attachment, issued from the District Court of the First Judicial

District of the State of Montana, in and for Lewis and Clarke County, upon which he acted as sheriff, and the plaintiffs in reply having denied that he acted as sheriff, and the plaintiffs having introduced proofs tending to disclose the execution of the bill of sale to one William Oliver as their agent on the same day which the first writ of attachment was levied, but prior in the day, which said bill of sale was introduced in evidence and was simply signed by the vendors thereto, and was not accompanied by any affidavits of any party thereto, or any person whomsoever, that the same was made in good faith, or that it was made to secure the amount named therein, or that it was made without any design to hinder or delay any creditors of the vendor or any kind or character of affidavit, and was not acknowledged by any person whomsoever, and was never filed in the recorder's office of Lewis and Clark County, or any recorder's office, or filed at all. And tending to show an occupancy of the premises and a possession of the stock of goods under the bill of sale at the time of the levy, plaintiff's own witnesses testified with reference to the circumstances under which the defendant took the goods, as follows, to-wit:

William Olliver stated: I was in fact making an inventory of the outstanding accounts from the books when the deputy sheriff came in to levy for the First National Bank. I think that Mr. Turner, who was present at this time, had informed the deputy sheriff that I was in possession and that I had received the same as security, and that therefore the attachment writ of the First National Bank had better not be levied.

Also as follows: I remained in possession of said property from the time I received the possession, in the morning of March 18th, 1889, until between three and four o'clock in the afternoon of that day, at which time I was deprived of such possession by the sheriff, Jefferis.

Between three and four o'clock of that afternoon a deputy sheriff came to the store with an attachment writ. Mr. Turner was then in the store and I came in a few minutes thereafter. Mr. Turner and myself refused to surrender possession and demanded that the sheriff come in person so that we might warn him against the danger of interfering with our possession. We sent for the sheriff, who came shortly thereafter. Both Mr. Turner and myself told the sheriff that I was in full and exclusive possession of the property under the bill of sale from Landsman, and I exhibited the bill of sale to the sheriff. Mr. Turner and myself warned and cautioned the sheriff not to interfere with my possession. We told the sheriff that no one had a right to interfere with such possession, and if the sheriff did interfere we would hold him liable, and that the sheriff had better see that he had good and sufficient bonds of indemnity and that he had better go carefully to work before interfering with our rights under the bill of sale.

Interrogatory 24—If you state in response to Interrogatory 23, that the sheriff levied an attachment upon said stock of goods, state what took place between yourself and the defendant, giving the full conversation. A. This interrogatory is answered substantially by my answer to the preceding interrogatory, which latter answer I make part of this answer. Mr. Turner and myself protested against the sheriff levying the attachment writ. We notified him he would do so at his peril; that he had no right to do so; that it was dangerous to interfere with our rights; and that we were exclusively entitled to the possession of the property, and held the same under the bill of sale, and then exhibited the bill of sale to the sheriff as security for our claims. The sheriff, however, stated that he had the attachment writ of the First National Bank of Helena; that it was his duty to levy the writ; that personally he did not wish to interfere with

us, but that the writ commanded him to make the levy; that he felt bound to do so under the law, and that he had good and sufficient indemnity from the bank for so doing. Thereupon the sheriff, Mr. Jefferis, did levy the attachment writ of the First National Bank; took possession of the property which I held under the bill of sale, and ordered us out of the store. The sheriff then took possession himself, and placed a custodian in charge of the property.

Interrogatory 25—State what you did and what action you took at that time. A. I was forced out of possession of the property covered by the bill of sale; was compelled to, and did give possession to the sheriff, but protested against the sheriff's interference, and warned and notified the sheriff that he would be held responsible for his action in levying upon the property.

He also stated: "No inventory was made or caused to be made by myself of the stock of goods prior to the levy of the First National Bank, and that levy dispossessed me and prevented of the making of the inventory. By an agreement made with the sheriff, however, an inventory was made after he took possession, in which we were assisted by the sheriff's custodian."

He also stated: "During that ten minutes' absence the deputy sheriff had come and Mr. Turner and myself insisted that he send for the sheriff before a levy was made."

The witness, Jacob H. Bauland, testified as follows: "Mr. Landsman stated that he considered the costs too large, but that after some persuasion they were able to adjust this, but broke off on the question of the attachment which Turner and Oliver refused to indemnify Landsman against. This attachment, as I have stated, were as I recall it, all different creditors, chiefly the First National Bank of Helena."

The witness Phillip Stein, testified as follows: "That

this condition of things existed for a few hours before any attachment was levied. He, Landsman, adding in this connection, that it was not until after dinner that the bank caused a levy to be made."

He also stated: "I gathered from what he stated that Lissner wanted to pay Oliver and Turner the amount of their claims, provided they would go to work and get the attachment of the First National Bank and some people from San Francisco off—that is, fight the attachments of the First National Bank."

C. W. Turner, one of the plaintiffs, also testified as follows: "Afterward, about four o'clock in the afternoon of the same day, which I think was the 18th of March, 1889, Sheriff Jefferis, the defendant, came in person, claiming to have a writ of attachment at the suit of the First National Bank." He also stated: "Mr. Jefferis informed me that he had an indemnity bond from the bank, which he said would fully protect him, and he thereupon seized all the merchandise and other chattels contained in the store, under the attachment for the First National Bank of Helena. Subsequently and while he held the goods under that attachment and other attachments subsequently issued and levied thereon, he courteously permitted us," etc.

He also stated: "And hereafter declined to recognize our claims, that is, the claims of the creditors named in the bill of sale as having priority over the attachment of the bank."

All the evidence in chief having been introduced on the part of the plaintiffs, and the plaintiffs having rested, the plaintiffs moved the court for leave to file an amended replication in said cause, to which said motion for leave to amend, the defendant then and there objected, and objection was in words and figures as follows, to-wit:

1. Upon the issues as now framed and the proof of plaintiffs the court is without jurisdiction and cannot ac-

quire it by an amendment; in this that the complaint is for the recovery of personal property, defendant in his answer justifies the taking under a writ of attachment regularly issued out of a State court; the reply admits the issuance of the writ as pleaded in the answer, but denies that the defendant took under it, while the proofs of plaintiffs show that he did so take; and also because the offered amendment does not avoid want of jurisdiction, at present apparent.

2. It changes the nature of the action in that it would hold him for an official act instead of as an individual, also because responsibility for an official act would be barred the provisions of Sections ——, and Chapter ——, of the Compiled Statutes of Montana, p. —— , (Statutes of Limitations); further, because the change is accomplished by a replication to which the statute may not be pleaded.

3. Because it changes it from an action to recover possession to an action for damages on account of the taking.

4. Because the Statute of Limitations aforesaid had barred the new form of action.

5. Offered amendment comes too late.

Which objections were then and there severally overruled, and to which ruling of the court the defendant then and there duly excepted, and thereupon, leave to so do being first given by the court, said amended replica- was then and there filed.

Whereupon the defendant moved the court to direct the jury to find a verdict for the defendant, upon the following grounds, to-wit:

Plaintiffs' proofs disclose want of jurisdiction in this, that at the time of the commencement of this suit part of the plaintiffs were, and yet are, residents of the State of Washington, and part of the plaintiffs were, and yet are, residents of the State of Illinois.

Their proofs and statements of their counsel disclose

that the real parties in interest, as defendants, at the time of the commencement of this suit, were and are, other persons than the defendant Jefferis, and there is no averment or proof as to their residence at any time, or that it is the same as that of the defendant Jefferis.

Because the proofs disclose that the defendant took the goods in suit as the goods of Landsman & Co. (whether they were so in fact or not), under a writ of attachment issued from a State court and directed to the defendant as sheriff, requiring him to take the goods of Landsman & Co. in a suit brought by the First National Bank of Helena as plaintiff, and J. E. Landsman & Co. as defendants, and that this is the taking complained of.

There is a variance between the pleadings and proof in this; pleading allege a sale by way of security; the proofs tend to show a sale absolute.

Insufficiency of proofs in this:

Under the authority proven in Oliver he had no authority to take a bill of sale and there was no ratification of his taking before defendant took possession.

The bill of sale was either a sale outright or by way of security; if the former, it was void for want of authority in Oliver; if the latter, it was void for want of acknowledgment, verification, etc.

The proofs show that the bill of sale was used to protect claims not considered at the time of its execution, and for which it was not a security, which would void it.

Because, if but a security, sheriff's levy would be rightful even if bill of sale valid, and sheriff would only be liable for amount of payment which he ought first to have.

Which said motion was by the court overruled, to which ruling of the court the defendant then and there and at the time excepted.

And thereafter defendant introduced evidence in support of his answer under the issues raised by the com-

plaint, answer, first amendment to answer, and amended replication, and thereafter evidence was introduced in rebuttal, and all the evidence being closed on the part of plaintiffs and defendant, the defendant moved the court for leave to file a second amendment to his answer on file in said cause, which said motion was by the court allowed, and said second amendment to answer thereupon filed.

HIRAM KNOWLES,
Judge.

Dated this 6th day of October, 1891.

The foregoing eight bills of exceptions are this day signed and settled as correct by the court.

HIRAM KNOWLES,
District Judge of Ninth Circuit (U. S.) Court.

UNITED STATES OF AMERICA, }
District of Montana. } ss.

CIRCUIT COURT OF THE UNITED STATES, }
Ninth Circuit, District of Montana. }

I, George W. Sproule, clerk of said Circuit Court, do hereby certify and return to the honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of . . pages, numbered consecutively from 1 to . ., inclusive, is a true and complete transcript of the records, process, pleadings, orders, judgment and other proceedings in said cause, and of the whole thereof, as appears from the original records and files of said court; and I do further certify and return that I have annexed to said Transcript and included within said paging the original citation and writ of error, and also proof of service of said citatiation and writ of error.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at Helena, in the District of Montana, this 17th day of October, in the year [SEAL.] of our Lord, one thousand eight hundred and ninety-one, and of the Independence of the United States, the one hundred and fifteenth.

GEORGE W. SPROULE,
Clerk.

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